No. 87-781

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

JOYCE ATKINSON,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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12 pp

QUESTIONS PRESENTED

1. Is a suit by a servicewoman for medical malpractice in treating her pregnancy while on active duty barred under *Feres v. United States,* 340 U.S. 135 (1950), and if so, should *Feres* now be overruled as an incorrect construction of the Federal Tort Claims Act (28 U.S.C. § 2674)?

2. Does the acceptance of free medical care for pregnancy in a military hospital by a woman in the armed forces on active duty mean that any malpractice toward her is incurred "incident to service", thus precluding that woman from suing the United States for negligent medical care, when a man on active duty, whose wife is given the same free medical care on account of his service in the armed forces, would not be so precluded from suing the United States for negligence toward his wife?

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The petitioner Joyce Atkinson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on August 13, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals, granting the petition of the United States for rehearing and withdrawing the previous opinion published at 804 F.2d 561 (9th Cir. 1986), *modified,* 813 F.2d 1006 (9th Cir. 1987), is reported at 825 F.2d 202, and is reprinted in the appendix hereto, pp. A-2ff., *infra.* The earlier opinion of November 14, 1986 (now withdrawn) is reprinted beginning at p. A-16, *infra,* and the orders of March 27 and July 7, 1987 are reprinted at p. A-14 and p. A-13, respectively.

The memorandum decision of the United States District Court for the District of Hawaii (Fong, J.) has not been reported. It is reprinted in the appendix hereto, pp. A-35ff., *infra*.

JURISDICTION

Pursuant to 28 U.S.C. §§ 2674 (the Federal Tort Claims Act—"FTCA"), petitioner Joyce Atkinson filed this action on August 1, 1984 in the United States District Court for the District of Hawaii, which had jurisdiction under 28 U.S.C. § 1346 (b) (1982).

The district court dismissed the action, and petitioner appealed to the United States Court of Appeals for the Ninth Circuit, which had jurisdiction under 28 U.S.C. § 1291 (1982). That court rendered its initial opinion and judgment in petitioner's favor, reversing the dismissal below, on November 14, 1986. On November 21, 1986, the United States' motion for an extension of time within which to seek a rehearing was granted, and its time for filing a petition was extended to December 29, 1986. On December 18, 1986 the United States sought leave for a further extension until January 12, 1987 within which to file its petition for rehearing. Before that motion was acted upon, the United States on January 2, 1987 actually filed its petition for rehearing with suggestion for rehearing en banc, together with a motion for leave to file it *instanter*, which the court granted.

On March 27, 1987 the court entered an order (reported at 813 F.2d 1006 and reprinted at p. A-14, *infra*) which modified slightly its previous opinion and which appeared to the parties to deny the government's petition for rehearing. The government then prepared to petition this Court for certiorari while its suggestion for rehearing *en banc* remained pending. On May 18, 1987, this Court decided *United States v. Johnson*, 107 S.Ct. 2063, and the government called this decision to the attention of the *en banc* panel. The government also sought clarification of the effect of the court's March 27 order. In response, the clerk of the court wrote to all counsel confirming that the suggestion for rehearing *en banc* was still pending, but also conveying the views of the *Atkinson* panel that their March 27 order was not intended to act

as a denial of the government's petition for rehearing. The government then moved on June 18, 1987 to vacate and withdraw the order of March 27, which motion the court granted by order dated July 7, 1987 (see appendix p. A-13, *infra*). (In the meantime, as a precautionary measure, the government had also sought and obtained leave of this Court extending the time which to file its petition for certiorari until July 25, 1987 (*United States v. Joyce Atkinson*, No. A-922, June 17, 1987).

On August 13, 1987 the Ninth Circuit panel in *Atkinson* filed its new opinion and judgment in the case. The court withdrew its November 14, 1986 opinion and affirmed the dismissal below in the government's favor, based chiefly on the intervening decision in *Johnson*. Petitioner Atkinson did not seek a further rehearing in the Ninth Circuit.

The jurisdiction of the Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

28 U.S.C. § 2671. Definitions.

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.
>
> "Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 U.S.C. § 2674. Liability of the United States.

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2680. Exceptions.

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.
>
> . . .
>
> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war. . . .

Former 31 U.S.C. § 223 (b) (1943; repealed 1946):

> The Secretary of War, and, . . . other officer or officers as he may designate . . . are hereby authorized to consider, ascertain, adjust, determine, settle and pay in an amount not in excess of $500, or in time of war not in excess of $1,000, . . . any claim against the United States . . . for damage to or loss or destruction of property, real or personal, or for personal injury or death, . . . provided, the provisons of this Act shall not be applicable to claims arising in foreign countries . . . or the claims for damage to or loss or destruction of property of military personnel . . . if such damage, loss, destruction, injury, or death, occurs incident to their service.

Legislative Reorganization Act of 1946, Pub. L. No. 70-601, § 424, 60 Stat. 812 (1946):

> All provisions of laws authorizing any Federal agency to consider, ascertain, adjust, or determine claims on account of damage to or loss of property, or on account of personal injury or death . . . are hereby repealed . . . the provision granting such authorization now contained in the following laws; . . .

STATEMENT OF THE CASE

Petitioner Joyce Atkinson was in March 1982 serving as a Specialist (4th Class) with the United States Army in Honolulu, Hawaii. She was at that time just completing the second trimester of a pregnancy. On March 26, 1982 she reported to Tripler Army Medical Center ("Tripler", one of the largest military medical facilities west of the Mississippi) with symptoms of blurred vision, high blood pressure, and swelling. She was not treated, and was told to go home.

Three days later, Joyce Atkinson again came to Tripler and showed symptoms of dizziness, nausea and hypertension. Once again, she was not treated and was advised to go home. After two weeks, she returned to Tripler, with severe abdominal pain and hypertension. This time she was hospitalized for pre-eclampsia, a condition occurring in pregnancy which is life-threatening to both mother and child. (The condition may result in kidney failure, stroke, and premature birth; its cause is unknown to medical science.) Atkinson was then delivered of a stillborn son, and suffered physical and emotional injuries of her own.

Atkinson filed suit against the government under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674 (1982), alleging that she "suffered great pain of body and mind and sustained serious and permanent bodily injuries as a result of the negligence of defendant's agents, employees and/or representatives in failing to properly diagnose her condition and hospitalize, treat, monitor and care for her." The court dismissed the action on the ground that *Feres v. United States,* 340 U.S. 135 (1950), barred her claims, and Atkinson appealed.

Initially the Court of Appeals for the Ninth Circuit reversed the dismissal. Considering recent Supreme Court and appellate case law interpreting the scope of the *Feres* doctrine, the court found that the only current rationale for barring FTCA suits by members of the military under *Feres* was the potential effect which such suits might have on military discipline.

Viewed in that light, Atkinson's claims were not the type to evoke any concern under *Feres:*

> At the time Atkinson sought treatment, she was "not subject in any real way to the compulsion of military orders or performing any sort of military mission." *Johnson* [*v. United States*], 704 F.2d at 1439. No command relationship exists between Atkinson and her attending physician. No military considerations govern the treatment in a non-field hospital of a woman who seeks to have a healthy baby. No military discipline applies to the care a conscientious physician will provide in this situation.
>
> ... We are not dealing with a case "where the government's negligence occurred because of a decision requiring military expertise or judgment" ... The care provided a pregnant woman hardly can be considered to be distinctively military in character. In short, Atkinson's injuries have nothing to do with her army career "except in the sense that all human events depend upon what has already transpired." *Brooks* [*v. United States*], 337 U.S. at 52. There is simply no connection between Atkinson's medical treatment and the decisional or disciplinary interest protected by the *Feres* doctrine.

(Pp. A-30-A-32, *infra.*) Thus the court determined that Atkinson's claims were not barred under *Feres.*

While the government's petition for rehearing was pending, this Court handed down its opinion in *United States v. Johnson,* 107 S.Ct. 2063 (1987). In that case Justice Powell, writing for a majority of five justices, held that the widow of a Coast Guard helicopter pilot was barred by *Feres* from suing the government under the FTCA for alleged negligence by civilian employees of the Federal Aviation Agency that led to his death while piloting

an official rescue mission. In its opinion the Court expressed its concern for the degree to which a trial in the *Johnscon* suit might involve the courts in sensitive questions affecting military command organization and discipline (the usual rationalee for applying *Feres*). However, as it had also done in *Shearer* (4773 U.S. at 58 n.4), the Court noted the presence in *Johnson* of twco of the other factors cited by the *Feres* court in support of its holding: the "distinctively federal relationship" between the govvernment and its soldiers, which made it inappropriate to resoort to widely differing standards under state tort laws, and the facct that Johnson's widow was receiving the alternative benefits whhich Congress had provided for service-connected death under tthe Veterans' Benefits Act, 38 U.S.C. §§ 310 et seq.

In *Shearer,* these latter two rationales had been dismissed by the Court as "no longer controlling" the outcomee of a *Feres* case—*Shearer* simply noted their presence in passingg (*ibid.*). But in light of *Johnson's* mentioning them again, the Ninth Circuit reviewed its earlier holding to determine whether giving any role to the old rationales was still appropriate. In doing so, it noted that these other factors had been present in two of thhe companion cases to *Feres* which, like *Atkinson*, had involveed claims of medical malpractice. (*Griggs v. United States,* 178 F.2d 1, 2 [10th Cir. 1949], *rev'd sub nom. Feres v. United States,* 3340 U.S. 135 [1950]; *Jefferson v. United States,* 77 F.Supp. 706, 7708 [D. Md. 1948], *aff'd,* 178 F.2d 518 [4th Cir. 1949], *aff'd sub nom. Feres v. United States,* 340 U.S. 135 [1950].) The court considered that Atkinson's claim was distinguishable from both *Griggs* and *Jefferson,* particularly in light of the facts that the treatment of her pregnancy could not be readily deemed "incident to her service," and that women were not even permitted in the regular army until 1978, some 28 years after *Feres,* so that her fact situation could not have been within the contemplation of the *Feres* court. "We are nonetheless reluctant," concluded the *Atkinson* panel, "to carve out an exception to the *Feres* doctrine after five members of the Court appear to have emphatically endorsed *Feres* and all three of its rationales. That task, if it is to be undertaken at all, is properly left to the Supreme Court or to Congress" (pp. A-10-A-11, *infra*). Accordingly, it reinstated the district court's dismissal.

REASONS FOR GRANTING THE WRIT

I. *Feres* Interpreted the FTCA Incorrectly with Respect to Military Medical Malpractice and Should Be Overruled: a Case-by-Case Approach Is Preferable to Bright-Line Rules or Legislation

Feres consists of a rule ("the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service"—340 U.S. at 146) and three rationales advanced to support it:

> (1) the potential for involvement of "the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*United States v. Shearer,* 473 U.S. 52, 59);[1]
>
> (2) the availability of an alternative system of compensation for service-related injuries under the Veterans' Benefits Act (*Feres,* 340 U.S. at 144-45); and
>
> (3) the distinctively federal relationship between a soldier and his government, which can post him at will in any U.S. state or territory and which results in it making "no sense" the "the geography of an injury should select the law to be applied to his tort claims" (*Feres,* 340 U.S. at 143).

The rule of *Feres,* however, has never had any discernible content. Nearly four decades of confusing and conflicting case law attest to its ambiguities. The phrase "activity incident to service," read into the FTCA by the *Feres* court, is so open-ended that it has been held to comprise driving home from the grocery store in a civilian vehicle on a public highway which crosses Eglin Air Force Base in Florida while off-duty, so as to deny recovery (*Flowers v. United States,* 764 F.2d 759 [11th Cir. 1985]), but it does not include riding a motorcycle back from a personal errand on a public highway which crosses Fort Stewart in Georgia while off-duty (*Pierce v. United States,* 813 F.2d 349 [11th Cir. 1987];

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[1] This rationale was actually not expressed in *Feres* itself, but appeared in subsequent cases beginning with United States v. Brown, 348 U.S. 110, 112 (1954)—see citations *infra,* at 14.

see also Hand v. United States, 260 F.Supp. 866 [M.D.Ga. 1966]); on the other hand, it includes sleeping while off-duty in a base's family quarters when a military aircraft crashed into the building (*Orken v. United States,* 239 F.2d 850 [6th Cir. 1956]); but not sleeping while off-duty in a trailer home located a short distance off base when a military aircraft crashed into it (*Sapp v. United States,* 153 F.Supp. 496 [W.D.La. 1957]; *see also Snyder v. United States,* 350 U.S. 906 [1955], *aff'g* 118 F.Supp. 585).

These results, typical of the quagmire brought about in the name of *Feres,* cannot be rationalized by any purported divination of Congressional intent behind the FTCA.[2] The key language "incident to service" was lifted by the *Feres* court out of the old Military Personnel Claims Act, former 31 U.S.C. § 223(b) (1943), which Congress *repealed* in passing the FTCA. (*See* statutes quoted pp. 4-5, *supra.* The new Administrative Claims Act, 28 U.S.C. § 2672, authorizes settlement of military and other claims up to $25,000 *without regard to* whether they arise "incident to service.") Normally this Court would take the language replaced by a subsequent enactment of Congress as an indication of that which Congress intended to *change*—otherwise the repeal is given no effect. *See, e.g., Thompson v. Thompson,* 218 U.S. 611 (1910). The rule of *Feres* thus rests on a statutory construction erected in spite of the FTCA, and not because of it.

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[2] Petitioner submits that whenever the outcome of a case turns solely upon such bright lines as on-duty or off-duty, but the factual inquiries into the underlying negligence remain the same on both sides of the line that is drawn, the intent of the FTCA is being ignored. No amount of straining can infer a Congressional intent that members of the armed forces living in houses off base should be allowed to recover while those living on base should not, or that those deemed "off-duty" should be entitled to sue, while those deemed on active duty in law (even though off-duty in fact) should be barred, where the underlying inquiry into negligence is identical. The current malpractice legislation before Congress makes this point clear, but it affects of course only cases arising on or after its enactment. *See* H.R. 1054 and S.347 (100th Congress, 1st Session); the former has received a favorable report and may come before the full House by the end of the year. Needless to say, only this Court has the power to alter the rule in a case (like Atkinson's) that has already accrued before the enactment of corrective legislation.

For that reason alone, the rule of *Feres* is an incorrect construction of the FTCA and deserves to be overruled.

Another reason for discarding the "incident to service" test is that the rule affords no basis for deciding a given case. It has become instead a simplistic rubric under which to lump the various results. The three cases in *Feres* itself cannot rationally be derived from the formula, and the *Feres* court made no attempt to indicate how its "rule" applied to each of the three cases.[3] As a result, the Court has been called upon time and again to explain just what it meant in *Feres*.[4]

Enough has been written about the defects in the rationales for *Feres* that it is necessary here only to give the references in the margin.[5] It is no longer possible to defend rationally the doctrine as applied. Instead, the courts' standard refuge has been to hide behind the silence and inaction of Congress over the last four decades. This amounts both to an abdication of judicial responsi-

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[3] *Feres* itself took no note of earlier FTCA cases such as Costley v. United States, discussed *infra* at 15, which allowed a soldier to sue his government for medical malpractice by a military physician which injured his wife. As discussed *infra*, at 15-18, such a holding is irreconcilable with *Feres* unless application of *Feres* itself is limited to claims which would involve the courts in "sensitive military affairs" (*Shearer*, 473 U.S. at 59).

[4] *E.g.*, United States v. Brown, 348 U.S. 110 (1954); United States v. Muniz, 374 U.S. 150 (1963); Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977); United States v. Shearer, 473 U.S. 52 (1985); United States v. Johnson, 107 S.Ct. 2063 (1987). It should be noted that with the exception of *Stencel*, all of these cases were instances where the Solicitor General asked this Court to review the holding below; many other cases, such as the anomalies noted *supra*, at 8-9, never are presented to this Court because the Solicitor General exercises his prerogative not to take further proceedings.

[5] The most recent succinct criticism is contained in the dissent in United States v. Johnson, 107 S.Ct. at 2070-76, which summarizes the cases and cites a number of academic criticisms as well. A particularly full critique of *Feres* and its rationales is found in Note, 14 Valparaiso Univ. L. Rev. 527 (1980).

bility for the state of judge-made law, and to a continued misreading of Congressional intent in enacting the FTCA.

The core insight of *Feres*—that Congress could not have intended to allow *all* suits by military personnel for government negligence—provides the most likely explanation for the failure of Congress to respond to *Feres* with legislation. Legislation produces bright-line rules, and the Court has already acknowledged that *Feres* "cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." *Shearer,* 473 U.S. at 57.

Notwithstanding the caution of *Shearer* about reducing *Feres* to "a few bright-line rules," the government wishes to draw precisely such a line in medical malpractice cases. It reasons that if negligence is alleged on behalf of a soldier on active duty while confined to a military hospital, *Feres* applies and all further factual inquiry is at an end. The attempt to justify this rule then leads to a legal fiction: suits for medical malpractice by members of the armed forces are presumed to be "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." (Petition of the United States for Rehearing with Suggestion for Rehearing *en Banc,* filed herein January 2, 1987, at 7-8, quoting *United States v. Shearer,* 473 U.S. at 59.)

The panel below, even while upholding the dismissal of Atkinson's suit based on *Johnson,* continued to adhere to its finding that suits for medical malpractice occurring in military non-field hospitals had *no* perceivable effect on military order or discipline (p. A-8, *infra).* To support this finding requires only a citation to the cases discussed in the next section, which allow military dependents—*and* the servicemen upon whom they depend—to sue and to recover for malpractice suffered in military hospitals, *i.e., a military spouse would be allowed to proceed on a claim identical to that of Joyce Atkinson's.* In effect, Congress has already made the policy judgment for the judiciary: the FTCA provides that members of the armed services acting in the line of duty are considered employees of the government acting within the scope of their employment (28 U.S.C. § 2671, quoted *supra,* at 3), and there is no exception from liability for negligence by

the military except for "combatant activities . . . during time of war" (28 U.S.C. § 2680[j] [*ibid.*]). The logical conclusion is that Congress in 1946 saw no difficulty with suits for military medical malpractice from the very beginning, at least from the standpoint of applying state-law standards of care to military physicians, and of second-guessing military decisions.

Now, thirty-seven years later, we are operating under circumstances even more remote than the concerns which might be imagined to have produced the results in *Feres*. Since 1976, Congress has made military doctors no longer subject to personal liability (10 U.S.C. § 1089). Therefore, the usual concerns about a soldier suing his superior, expressed in many older cases (*e.g., Bailey v. Van Buskirk*, 345 F.2d 298 [9th Cir. 1965], *cert. denied*, 383 U.S. 948 [1966], simply do not apply in malpractice cases.[6]

Concerns about military doctors being brought into court to testify are likewise ephemeral, given that they must do so already in cases brought by dependents and veterans. Indeed, the reality is that with the nonliability afforded the government by *Feres*, the only incentive to improve standards of military medical care has come from the litigation allowed to military dependents and to veterans. As a result, the armed forces now have a claims process

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[6] This concern stems from a remark of Justice Jackson in *Feres* (340 U.S. at 141), amplified in a later case thus:

> It is not yet within the Amercian legal concept that one soldier may sue another for negligent acts performed in the line of duty. The idea is that an undisciplined army is a mob and he who is in it would weaken discipline if he can civilly litigate with others in the army over the performance of another man's army duty.

Bailey v. DeQuevedo, 375 F.2d 72, 74 (3d Cir. 1967). Apart from the fact that the statement quoted erroneously equates "in the line of duty" in the army with a physician's duty to his patient, the premises upon which it stands have been eroded by subsequent scholarship. There is eminent authority for the proposition that at common law, suits by a soldier against a fellow soldier for injuries due to negligence were allowed. *See* 2 W. Winthrop, *Military Law and Precedents* 1382 (Boston: 2d ed. 1896); *see also* Jaffee v. United States, 663 F.2d 1226, 1257 n. 22 (Gibbons, J., dissenting) (3rd Cir. *en banc* 1981), *cert. denied*, 456 U.S. 972 (1982).

for malpractice in place, which operates efficiently enough; reported court decisions involving military dependents' claims of malpractice are few and far between.[7] In fact, given the relative frequency with which the lines of *Feres* are tested in malpractice suits brought by servicemen and their representatives, compared to the relative paucity of reported malpractice suits brought by dependents and veterans, there is obviously a basis on which to predict that the administrative claims process presently in existence will *lessen* the current burden on the courts in the great majority of such cases, where questions of military decisions and discipline are not involved.

In such circumstances, petitioner submits that the maxim, *cessante ratione legis, cessat et ipsa lex* ("when the reason for the rules ceases, the rule itself ceases as well"), fits in this case. The judicial creation of a legal fiction is intended to carry out a policy purpose; that policy purpose is supposed to derive from an ascertainable intent of the legislature. No one can point to the intent of Congress in enacting the FTCA and divine that malpractice claims of spouses were included within the scope of the Act, while identical malpractice claims of soldiers were not. This is even more the situation when, as in this case, the malpractice involves pregnancy, a condition of the American soldier on active duty that was not even within the contemplation of Congress in

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[7] A 1971 case reasoned that if the legal fiction regarding the presumed effect of malpractice suits upon discipline were abandoned, the armed services would be faced with maintaining a claims department, a decision that should be left to Congress. Hall v. United States, 451 F.2d 353, 354 (1st Cir. 1971). The court unaccountably overlooked the fact that an efficient military claims department had already been processing dependents' malpractice claims since before *Feres*. The same department, of course, must pass on all claims of *servicemen* and their representatives before they are brought to the courts (28 U.S.C. § 2401[b]). Thus the number of claims to be processed would increase only by the number of servicemen presently deterred from litigating even liability under the existing bright-line rules; the remainder consist of existing claims that will have to be examined for damages in addition to liability. Surely that would not be too unequal a trade-off for the current burden on the Department of Justice in litigating over "incident to service".

1946. When the bright line that has previously been drawn in a case of this type ("injuries received in military hospitals while on active duty are received incident to service") begins to produce results obviously arbitrary and irreconcilable with legislative intent, it is an indication that blind adherence to a legal fiction, or *stare decisis,* has replaced the original reason for the rule.

It is time, therefore, to confine *Feres* to a rule that *can* be applied on a case-by-case basis. Such a rule is the one articulated first in *United States v. Brown,* 348 U.S. 110, 112 (1954) (*Feres* best explained by "the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty") and developed further in *United States v. Muniz,* 374 U.S. 150, 162 (1963) and *Stencel Aero Engineering Corporation v. United States,* 431 U.S. 666, 673 (1977), *Chappell v. Wallace,* 462 U.S. 296, 300, 304, and *United States v. Shearer,* 473 U.S. 52, 57-59 (1985). Application of that rule can best begin with the case presented for review by this petition.

II. Even Under the "Incident to Service" Test, Malpractice in Treating a Soldier's Pregnancy Is Not Barred by *Feres*

If *Feres* is not to be overruled, this case should at a minimum serve as the vehicle by which to mark its limits. Although it is true to observe that two of the companion cases decided along with *Feres* involved military medical malpractice, *Feres* itself, along with *Shearer,* teaches that no bright-line rule against *all* cases of malpractice was thereby established.

The *Feres* decision was handed down in 1950. Since that time:

1. Women have been admitted to the regular armed forces (Pub. L. 95-485, Title VIII, § 820[a], effective Oct. 20, 1978);

2. Military doctors have been granted statutory immunity from personal liability for malpractice (Pub. L. 94-464, § 1[a], effective Oct. 8, 1976);

3. Courts have uniformly affirmed that military *dependents* may sue the government for injuries due to malpractice in military hospitals (*infra*, at 15-16); and

4. Given these changes, it can no longer be contended that medical malpractice suits by servicemen have the potential for an adverse impact upon essential military discipline (pp. 11-13, *supra*).

In short, Joyce Atkinson's claim could not have *arisen* in 1950; pregnant women could not serve on active duty with the regular Army at that time. (10 U.S.C. § 505 was not amended to permit this until 1978.) Given that spouses and dependents have had their own actions for military medical malpractice from the very first, *Costley v. United States*, 181 F.2d 723 (5th Cir. 1950) (pre-*Feres*); *Herring v. United States*, 98 F.Supp. 69 (D. Colo. 1951), it makes no sense in terms of either Congressional intent or the *Feres* rationale to hold that Joyce Atkinson's claim is barred if she was in the Army herself, but not if she were the wife of a soldier.

A number of cases have reasoned that because military personnel receive free medical care in military hospitals only because of their military status, the injuries received due to malpractice were "incident to service." *See e.g., Johnson v. United States*, 704 F.2d 1431, 1438-39 (9th Cir. 1983), and cases cited. The reasoning has not escaped criticism, *e.g., Adams v. United States*, 728 F.2d 736, 740 (5th Cir. 1984). With all due respect, it is submitted that this reasoning cannot stand up to logical examination, and should be discarded.

The illogic appears when one considers the cases just cited that permit recovery to military dependents injured by malpractice, on the theory that such injuries do *not* occur "incident to service." (This is a perfect illustration of the empty content of the phrase "incident to service," as noted *supra*, at 10.) Military dependents, like military personnel themselves, are usually accorded treatment in military hospitals only because of their status. *Compare* 10 U.S.C. § 1076 (1982) *with Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980). Like military personnel, they too could not be injured "but for" the fact that they are privileged to receive free medical care in military hospitals. Yet this fact bars neither

their recovery *nor* recovery by the serviceman whose relation to them gives them the right to free medical benefits. Therefore, the receipt of free medical benefits, standing alone, is not determinative of whether injuries received from such care are received "incident to service." *See also Adams*, 728 F.2d at 738-41.[8]

By way of illustration, a woman in every respect identical to Joyce Atkinson, except for being the wife of a military man rather than in the military herself, could have received the same negligent treatment as Atkinson in all respects. The same witnesses would be called, the same factual inquiries made, the same claims of negligent conduct leveled against a military physician by a fellow member of the military (the woman's husband would be claiming that the negligence resulted in loss of consortium and loss of his wife's services). Neither the suit by the wife nor the husband would be barred. Yet the wife and Atkinson are indistinguishable in that they are both entitled to free medical care in the government's hospital.[9] Yes, it is on the surface true to say that in

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[8] The same result can be reached by analogy to United States v. Muniz, 374 U.S. 150 (1963) (using a "plain meaning" interpretation of the FTCA, Court permits a prisoner in government custody to recover for injuries received during confinement). The Court in *Muniz* had granted certiorari because of conflicting lower court decisions regarding prisoners that relied on *Feres*. Proceeding with precisely the same inquiry into Congressional intent that it conducted in *Feres*, the Court now concluded that Congress had authorized the prisoner's claim. The anomaly here is that, in contrast to *Feres*, the Court rejected an argument that such suits could disrupt discipline. Moreover, like military personnel, federal prisoners receive free medical care. Nevertheless the Court made no effort to distinguish *Feres*. Thus was born the egregious state of FTCA law pursuant to which criminals in confinement are accorded greater rights than free military personnel in the service of their country. Such inconsistency is another tell-tale sign that a legal fiction has outlived its purpose, and should be judicially consigned to the dustbin of history (as argued *supra*, at 8-14).

[9] Both women would also be indistinguishable in that regard from *any* woman employee in Hawaii, where employers are required by law to provide prepaid maternity benefits. *See* Haw. Rev. Stat. § 393-7 (Supp. 1984).

the one case, the primary negligence is directed toward a non-soldier and in the other case it is directed toward a fellow soldier. But in *both* cases the only reason it is possible to be negligent toward the victims at all is because of the *soldier's* military status. Given this unalterable fact, it exalts semantics over substance to claim that "decisions by the military toward enlisted personnel" are involved in the negligence toward a soldier, but not in the negligence toward a soldier's wife.[10] Would a military doctor view the standard of care and treatment as any different for the two patients, both of them pregnant women? Does not the injuring of a soldier's dependent wife, husband, or child have just as much an effect on military morale and discipline, and on the soldier's attitude toward his or her superiors, as does an injury to the soldier?

There *is* an anomaly here—one that simply cannot be reasoned away. It is an anomaly that is due to the continued application of a legal fiction that has outlived its usefulness in dealing with the situations encountered in today's armed forces. The fiction that medical malpractice injuries are received "incident to service" was invented by later courts to explain the *Feres* rule as applied in *Griggs* and in *Jefferson*. Now that the core concern of *Feres* is recognized as the potential which a given case may have on judicial involvement in purely military affairs, and given the intervening legislative changes made by Congress, the need for maintaining such a fiction in a medical malpractice case involving the treatment of a pregnant woman soldier has vanished.

It is therefore impossible to see how the facts of this case could lead to a disruption in military discipline any more than they would if Joyce Atkinson had been the wife of a serviceman, instead of in the military herself. A military woman being treated for pregnancy is not being treated for a disease, and the object of the treatment is to deliver a healthy baby, not to return the mother to active duty. (If the latter were the object, then the prescribed military treatment in each case would be an early

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[10] *Cf. Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

abortion.)[11] The doctor's relationship to his patient in this instance is not that of an officer to an enlisted person: he cannot "order" her to have an abortion, or a sonogram, or an amniocentesis, or to undergo any other treatment that might be indicated. He is under the traditional duty to exercise the highest degree of professional skill and care towards his patient. Barring unusual circumstances (having to do with the nature and quality of medical care available at given places and times in the military), there are absolutely *no* effects which an inquiry into that standard of care would have that have not already occurred with respect to the claims of military dependents allowed under *Feres*. In fact, it may fairly be said that the inquiry will have *less* of an effect than it would have had in 1950 when *Feres* was decided, because of the intervening legislation by Congress giving military doctors personal immunity from malpractice claims (*supra*, at 21). In these particular circumstances, it can make no difference whatsoever to the military whether the suit is brought by a pregnant military wife or by a pregnant female soldier—the injuries in both cases are not received "incident to service", as that phrase is presently used.

CONCLUSION

Respondent chided petitioner in the court below for failing to cite a single case holding that military personnel could recover for malpractice in a military hospital. Surely no gibe could better reveal the nature of the duties imposed upon the courts and counsel following *United States v. Shearer*, 473 U.S. 52 (1985). *Shearer* did away with the outdated "bright-line" analysis, at least to the extent that such a line has arisen barring automatically any claim for malpractice, including one brought by a pregnant female

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[11] Once the military decides to admit women to regular duty status, the military must make allowance for pregnancy as a matter of course. (That is why it seems to be stretching things a bit for the government to assert that Atkinson was truly on "active duty" when she was twenty-five weeks pregnant and toxemic to boot.) No impact on "essential military discipline" flows from that allowance. If there is an impact at all, it arises out of the original *Congressional* change of policy to admit women to regular army status (*supra*, at 15).

soldier which is no different in scope from countless similar claims allowed to female military dependents. The panel below stated flatly that Atkinson's suit did not invoke any threat to military discipline. Military discipline, however, is the "core concern" of *Feres*, according to *Shearer*.

Shearer, it must be remembered, *reversed* a "bright-line" holding in favor of the decedent serviceman's family. The Court overturned previously "settled" law because of the tendency of the established bright lines to veer from the central concern of *Feres* with military discipline. What is sauce for the goose, however, is sauce for the gander: if military plaintiffs can no longer, after *Shearer*, rely on bright-line tests to establish their claims where essential discipline is affected, then the government should no longer, after *Shearer*, be able to rely on bright-line rules where essential discipline is *not* affected. To hold otherwise would not only undermine the central teaching of *Shearer* that *Feres* is a case-by-case doctrine; it would be patently one-sided and unfair. The old rationales that were put to one side by *Shearer* would have to be resurrected, and that in turn, when military discipline is admitted *not* to be a factor, would violate the express words of *Shearer* that the old factors are "no longer controlling".[12]

Following *Shearer*, there is really nothing new that is necessary for this Court to do: it struck down all bright-line rules and commanded a factual inquiry in each case centered on the impact of the claim on "essential military discipline." That single direction in *Shearer* is far more preferable than would be a judicial creation of a new remedy for military torts, or the enactment of a statute to the same effect. It allows an examination of petitioner's claim unfettered by phony legal fictions and superficial rationales. It directs the courts to look into what is really at stake rather than

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[12] *Shearer*, 473 U.S. at 58 n. 4. Given that the *Johnson* case presented what the Court obviously felt was a potential impact on military discipline, there was for that very reason no need for the panel in *Atkinson* to be concerned about *Johnson's* controlling the outcome of a medical malpractice case. The real question was not the effect of *Johnson* upon *Atkinson;* it was rather the effect of *Shearer* upon *Griggs* and *Jefferson*.

to recite cant and dogma. There is no improvement, within the inherent limitations of a case-by-case approach, that this Court could make to the instruction in *Shearer* to take each case on its own facts. That is all that petitioner wishes the courts to do in her case.

In *United States v. Standard Oil Co.*, 332 U.S. 301, 311-13 (1947), a case relied on in part by *Feres* for the assertion that the relation between the government and its soldiers is uniquely federal in character, the shoe was on the other foot: the government was attempting to persuade the Court that already settled principles of tort law allowed it to recover damages for benefits paid to a soldier disabled by the negligence of a third party. Perhaps it will not be deemed unfair to turn the government's argument in that case to the petitioner's use in this case. In the elegant phrasing of Justice Rutledge:

> [The government] appeals first to the great principle that the law can never be wholly static. Growth, it urges, is the life of the law as it is of all living things. And in this expansive and creative living process, we are further reminded, the judicial institution has had and must continue to have a large and pliant, if also a restrained and steady, hand. Moreover, the special problem here has roots in the ancient soil of tort law, wherein the chief plowman has been the judge, notwithstanding his furrow may be covered up or widened by legislation.

332 U.S. at 311. Congress has, wisely or not, left to the courts the problem of defining the scope of the doctrine first heralded in *Brooks v. United States*, 337 U.S. 49 (1949), and then given birth in the *Feres* case. At first broadly painted as a preclusion of all claims calling into question the conduct of a member of the military toward one of his comrades in arms, the doctrine has been steadily narrowed in the thirty-seven years since. First, off-duty soldiers were given the right to sue for the negligence of on-duty soldiers toward them. Then veterans were allowed to sue for malpractice. Then on-duty soldiers located off military property were given the right to sue. Then on-duty soldiers serving in a non-military capacity on military property were allowed to sue. The present case involves an on-duty soldier, not fit for active

duty, injured while being treated for a condition not incident to her military status, but incident to her status as a woman. Seen in such a perspective, this case is one more step in the evolution of the *Feres* doctrine. For all of the foregoing reasons, certiorari should be granted and the case placed on the calendar for argument.

Dated: Nevada City, California, November 3, 1987.

Respectfully submitted,

ALLAN S. HALEY
Attorney for Petitioner
Joyce Atkinson

APPENDIX A

Filed in the
United States District Court
District of Hawaii
September 9, 1987
Walter A.Y.N. Chinn, Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOYCE ATKINSON,	)	No. 85-2200
	)	
Plaintiff-Appellant,	)	DC CV 84-0853
	)	HMF
v.	)	
	)	JUDGMENT
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellee.	)	

APPEAL from the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 13, 1987.

A-2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOYCE ATKINSON,
Plaintiff/Appellant,
v.
UNITED STATES OF AMERICA,
Defendant/Appellee.

No. 85-2200
D.C. No. C-84-0853
OPINION

Argued and Submitted
May 13, 1986—San Francisco, California

Filed August 13, 1987

Before: Dorothy W. Nelson, William C. Canby, Jr. and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Nelson; Concurrence by Judge Noonan

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

SUMMARY

Governmental Torts

Appeal from a grant of summary judgment in favor of the defendant. Affirmed. Petition for rehearing granted and this opinion substituted for opinion published at 804 F.2d 561 (9th cir. 1986). *modified*, 813 F.2d 1006 (9th Cir. 1987).

Appellant Joyce Atkinson (Atkinson) was serving in the U.S. Army in Hawaii and in the second trimester of her preg-

nancy when she reported to Tripler Army Medical Center complaining of blurred vision, hypertension and edema. The staff sent her home. Three days later she returned and was again sent home. Two weeks later she returned complaining of severe abdominal pain and hypertension, and was finally hospitalized for pre-eclampsia. After delivering a stillborn child she filed a malpractice suit against the government under the Federal Tort Claims Act (FTCA), alleging that she suffered great pain of body and mind and sustained serious and permanent bodily injuries as a result of the government's negligence in failing to properly diagnose her condition and treat her. The U.S. filed a motion to dismiss and the court found that Atkinson was injured in the course of activity incident to service and dismissed on the basis of immunity from malpractice liability.

[1] Although the FTCA provides jurisdiction over any claim founded on negligence brought against the U.S., [2] the *Feres* doctrine [from *Feres v. U.S.*, 340 U.S. 135 (1950)] immunizes the government from liability for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. The *Feres* doctrine was supported by three rationales, including the distinctively federal nature of the relationship between the government and members of its armed forces and the availability of alternative compensation systems. [3] But the best rationale of the *Feres* doctrine is the third rationale, the fear that suits will damage the military disciplinary structure. The previous decision in this case noted that the first two rationales were no longer controlling, and concluded that the FTCA permits an action in the novel case of a pregnant servicewoman because it would not undermine military discipline. [4] Since then, *U.S. v. Johnson*, 107 S.Ct. 2063 (1987), breathed new life into the first two *Feres* rationales. [5] In view of the fact that the first two rationales support application of the *Feres* doctrine in this case, it is necessary to affirm the district court's dismissal. [6] We are reluctant to carve out an exception after five members of the

Supreme Court have emphatically endorsed *Feres* and all three of its rationales.

Judge Noonan concurs in the opinion, and writes to emphasize other anomalies caused by the application of *Feres*.

COUNSEL

Allan S. Haley, Nevada City, California, for the plaintiff-appellant.

Mark J. Bennett, Honolulu, Hawaii, for the defendant-appellee.

OPINION

NELSON, Circuit Judge:

The petition for rehearing is granted. In light of *United States v. Johnson*, 107 S. Ct. 2063 (1987), the opinion published at 804 F.2d 561 (9th Cir. 1986), *modified*, 813 F.2d 1006 (9th Cir. 1987), is withdrawn and the following opinion is issued. The suggestion for rehearing en banc is moot.

Plaintiff-appellant Joyce Atkinson appeals from the district court's grant of summary judgment in favor of the defendant-appellee United States. Atkinson argues that the court erred in finding the United States immune from liability under the Federal Tort Claims Act for malpractice incident to pre-natal care she received from military personnel. We have jurisdiction under 28 U.S.C. § 1291 (1982). We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

In March 1982, Joyce Atkinson was serving as a Specialist (4th Class) with the United States Army in Hawaii. On March

26, during the second trimester of her pregnancy,[1] she reported to Tripler Army Medical Center ("Tripler"), complaining of blurred vision, hypertension, and edema. The staff at Tripler did not treat her and told her to go home. Three days later, Atkinson returned to Tripler, complaining of dizziness, nausea, and hypertension. Again, the Tripler staff merely told her to go home. Two weeks later, Atkinson returned to Tripler complaining of severe abdominal pain and hypertension. Finally, she was hospitalized for pre-eclampsia, a condition occurring in pregnancy that is life-threatening to both mother and fetus because of associated kidney failure, high blood pressure, stroke, and premature birth. She claims that as a result of this negligent medical treatment, she delivered a stillborn child and suffered physical and emotional injuries of her own.

Atkinson filed a malpractice suit against the government under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674 (1982), alleging that she "suffered great pain of body and mind and sustained serious and permanent bodily injuries as a result of the negligence of defendant's agents, employees and/or representatives in failing to properly diagnose her condition and hospitalize, treat, monitor and care for her."[1] The United States filed a motion to dismiss for failure to state a claim upon which relief may be granted, for judgment on the pleadings, and for summary judgment. The district court, finding that Atkinson was injured in the course of "activity incident to service," held that the United States was immune from malpractice liability. Thus, the district judge granted the motion for summary judgment in a judgment filed April 23, 1985, from which Atkinson filed this timely appeal.[2]

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[1]Atkinson's claims for injuries to her child are not at issue here. The parties have reached a settlement on those claims.

[2]The district judge's order was incorrect procedurally. When a court determines that the United States is immune from liability under the FTCA, the proper disposition is a dismissal for lack of subject matter juris-

II. DISCUSSION

[1] Determination of the district court's subject matter jurisdiction is a question of law reviewable de novo on appeal. *Redding Ford v. California State Bd. of Equalization*, 722 F.2d 496, 497 (9th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984).

The FTCA, passed by Congress in 1946, represents the culmination of a long effort to mitigate the unjust consequences of the common law sovereign immunity doctrine which protected the United States from tort liability. *Feres v. United States*, 340 U.S. 135, 139 (1950). Reacting against the notion that the sovereign could do no wrong, Congress provided in the FTCA that the United States is liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (1982). Congress did not exclude military personnel from FTCA coverage. The statute "provide[s] for District Court jurisdiction over *any* claim founded on negligence brought against the United States. . . . '[A]ny claim' [does not] mean[ ] 'any claim but that of servicemen.' " *Brooks v. United States*, 337 U.S. 49, 51 (1949).

[2] Despite this "sweeping," legislatively established waiver of immunity, *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951), in *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court created a judicial exception to Congress's general rule of governmental liability. This exception, informally known as the *Feres* doctrine, immunizes the government from liability under the FTCA "for injuries to servicemen where the injuries arise out of or are in the course

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diction, not a grant of summary judgment. *Broudy v. United States*, 661 F.2d 125, 128 n.5 (9th Cir. 1981). This error is of no consequence. Since properly viewed, this case involves an appeal from an order dismissing the action for want of jurisdiction, we accept as true, for purposes of appeal, the factual allegations contained in Atkinson's complaint. *Id.* at 126 n.1.

of activity incident to service." *Id.* at 146. The three rationales later identified as the foundation for this doctrine were: (1) the distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure. *See Stencel Aero Eng'g Corp. v. United States,* 431 U.S. 666, 671-72 (1977).

[3] In our previously issued opinion, we noted that subsequent cases had stated that the third rationale of the three listed above is determinative. *Chappell v. Wallace,* 462 U.S. 296, 299- 300, 304 (1983) (stating that *Feres* is best explained by the military discipline rationale); *Monaco v. United States,* 661 F.2d 129, 132 (9th Cir. 1981) (" '[T]he protection of military discipline . . . serves largely if not exclusively as the predicate for the *Feres* doctrine. . . . Only this factor can truly explain the *Feres* doctrine and the crucial line it draws . . . .' ") (quoting *Hunt v. United States,* 636 F.2d 580, 599 (D.C. Cir. 1980)), *cert. denied,* 456 U.S. 989 (1982); *see also Johnson v. United States,* 704 F.2d 1431, 1436 (9th Cir. 1983) (stating that safeguarding military discipline is the fundamental rationale for immunity).[3] Indeed, we noted that in *United States v. Shearer,* 473 U.S. 52 (1985), the Supreme Court specifically stated that the first two rationales are "no longer controlling." *Id.* at 58 n.4. We also noted *Shearer*'s instruction that courts should take a case-by-case, rather than

[3]These cases noted (1) that the special federal relationship rationale is undermined by the fact that FTCA suits are permitted between members of other federally created agencies and departments, and (2) that the availability of an alternative compensation system does not afford a justification for the *Feres* doctrine, but merely renders it more palatable. *See Johnson,* 704 F.2d at 1435.

An additional rationale suggested in *Feres* — the absence of parallel private liability — has apparently been abandoned. *Compare Feres,* 340 U.S. at 141-42, *with United States v. Johnson,* 107 S. Ct. 2063, 2065 n.2, 2068-69 (1987) (omitting reference), *and id.* at 2071 (Scalia, J., dissenting).

a *per se* approach to claims of immunity. *Id.* at 57 ("The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases."). Thus, in light of the novel situation posed by a pregnant servicewoman, we asked whether "[t]he facts of this case, viewed in light of the *Feres* doctrine's underlying disciplinary rationale, lead us to conclude that the FTCA does permit [Atkinson's] cause of action." *Johnson*, 704 F.2d at 1436. We reasoned:

> [W]e fail to see how Atkinson's suit for negligent care administered in a non-field military hospital incident to her pregnancy can possibly undermine "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). At the time Atkinson sought treatment, she was "not subject in any real way to the compulsion of military orders or performing any sort of military mission." *Johnson*, 704 F.2d at 1439. No command relationship exists between Atkinson and her attending physician. No military considerations govern the treatment in a non-field hospital of a woman who seeks to have a healthy baby. No military discipline applies to the care a conscientious physician will provide in this situation. Thus, in treating Atkinson for complications of her pregnancy, Atkinson's doctor was implementing decisions of military judgment only in the remotest sense. . . .
>
> Moreover, the circumstances of this case simply "do not involve the sort of close military judgment calls that the *Feres* doctrine was designed to insulate from judicial review." *Johnson*, 704 F.2d at 1440. We are not dealing with a case "where the government's negligence occurred because of a decision requiring military expertise or judgment." *Id.* Thus,

> a court hearing Atkinson's claim will not have to inquire into "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). The care provided a pregnant woman hardly can be considered to be distinctively military in character. In short, Atkinson's injuries have nothing to do with her army career "except in the sense that all human events depend upon what has already transpired." *Brooks*, 337 U.S. at 52. There is simply no connection between Atkinson's medical treatment and the decisional or disciplinary interest protected by the *Feres* doctrine.

Accordingly, we reversed the judgment of the district court and reinstated Atkinson's claims.

[4] While the government's petition for rehearing was pending, the Supreme Court decided *United States v. Johnson*, 107 S. Ct. 2063 (1987). In *Johnson*, a five-Justice majority affirmed the core holding of *Feres* that " 'the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service' " and barred a suit arising from the death of a Coast Guard helicopter pilot who was killed while performing a rescue mission due to the alleged negligence of a civilian federal radar controller. *Id.* at 2069 (quoting *Feres*, 340 U.S. at 146). Significant for our purposes is the Court's articulation, with apparent approval, of all three rationales associated with *Feres*. *Id.* at 2065 n.2, 2068-69. Simply put, *Johnson* appears to breathe new life into the first two *Feres* rationales, which until that time had been largely discredited and abandoned. *See id.* at 2071-72 (Scalia, J., dissenting) (noting the *Shearer* statement that the first two rationales are "no longer controlling").

[5] In view of these circumstances, we are compelled to affirm the decision of the district court on the basis of *Feres*

and *Johnson*. Although we believe that the military discipline rationale does not support application of the *Feres* doctrine in this case,[4] the first two rationales support its application. *Griggs v. United States*, 178 F.2d 1, 2 (10th Cir. 1949), *rev'd sub nom. Feres v. United States*, 340 U.S. 135 (1950); *Jefferson v. United States*, 77 F. Supp. 706, 708 (D. Md. 1948), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom. Feres v. United States*, 340 U.S. 135 (1950).

[6] Four Justices now believe that *Feres* was wrongly decided. *Johnson*, 107 S. Ct. at 2074 (Scalia, J., dissenting) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received.") (quoting *In re "Agent Orange" Prod. Liability Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y.), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)). We recognize that Atkinson's case is distinguishable on its facts from *Johnson*. The helicopter rescue mission in the latter case more obviously falls within the key phrase "activity incident to service" than does the medical treatment of a pregnant servicewoman in a non-field hospital. We also note that Atkinson's case differs in some respects from the malpractice situation in *Feres* itself.[5] We are nonetheless reluctant to carve out an exception to the *Feres* doctrine after

[4]Indeed, the *Feres* Court itself did not articulate the military discipline rationale, which was first suggested in later cases. *See Johnson*, 107 S. Ct. at 2071, 2073 (Scalia, J., dissenting) (noting the "later-conceived-of 'military discipline' rationale").

[5]First, the *Feres* Court is unlikely to have had in mind medical treatment of pregnant servicewomen in 1950. *See* 10 U.S.C. § 505 (1982) (admitting women into the regular armed forces as of 1978). To the extent that pregnant women should be accorded the highest degree of medical care because of the central role of the family in our society, application of the *Feres* doctrine promotes a particularly unjust policy that Congress is unlikely to have intended. Second, effective in 1976, Congress granted military doctors and medical personnel immunity from personal liability for malpractice. *See* 10 U.S.C. § 1089 (1982 & Supp. III 1985). This action further diminishes the extent to which a suit for damages might adversely affect the discipline underlying the relationship between a service member and a higher ranking medical officer. Third, the *Feres* Court rejected the

five members of the Court appear to have emphatically endorsed *Feres* and all three of its rationales. That task, if it is to be undertaken at all, is properly left to the Supreme Court or to Congress.

NOONAN, Circuit Judge, concurring:

The opinion of the court states cogently why the court issued its first opinion and why in deference to *United States v. Johnson* the court has withdrawn that opinion. The court also registers the unease caused by the judicial gloss on the congressional waiver of sovereign immunity. I concur in the opinion of the court and write to emphasize other anomalies caused by the application of *Feres*.

First. Common sense suggests that a single tortious act should not result in different legal consequences for different victims. *Feres* dictates differently. *United Air Lines v. Wiener*, 335 F.2d 379, 404 (9th Cir.) *cert. dismissed*, 379 U.S. 951 (1964) (civilian passengers recover, servicemen passengers do not when an Air Force plane negligently hits a commercial airliner). So here the government settles the claim of the estate of Baby Atkinson and refuses the claim of the baby's mother.

Second. To visit the status of a parent upon a child and so bar recovery by the child seems to be as primitive as punishing a child for his or her parents' fault — an outmoded and unconstitutional procedure. See *Levy v. Louisiana*, 391 U.S. 68 (1968). Under *Feres* a child with no connection with military service and no duty of military obedience is barred from

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analogy between a private individual and the government in part because "no private individual has power to conscript or mobilize a private army." *Feres*, 340 U.S. at 141-42. As we have already pointed out, this rationale appears to have been abandoned. *See supra* note 3.

recovering for an injury when the injury was incurred through government-inflicted injury on the child's enlisted parent. *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981) (birth-defective child of serviceman exposed to radiation denied recovery). That the government did not invoke this rule against Baby Atkinson is a tribute to its humanity but does little to mitigate the harshness of the general rule.

Third. A mother of a child is not merely an individual. She is in a relationship — a relationship that affects her existence. The child she is carrying is not of course a portion of her body like a limb or an organ. Such a notion was common in nineteenth century biology. See, e.g., *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884) (per Holmes, J.). The notion has been exploded by twentieth-century advances in biology and fetology. W. Liley, "**Experiments with Uterine Fetal Instrumentation**" in M. Kaback and C. Valenti, eds. *Intrauterine Fetal Visualization* (1976) 75. The child, as Liley has concluded, "is responsive to touch, pain and cold." *Id.*; *see also*, M. Rose, "**The Secret Brain: Learning Before Birth**", *Harper's*, April 1978, 46. But the child while a living sentient organism distinct from his or her maternal carrier has changed that carrier's being irrevocably. She is now a mother. The relationship is not merely histological. Interaction and interrelationship occur. Enriched in her existence, a mother has a relational dimension that should not be ignored. Although she is a servicewoman, a mother cannot be confined to her military status. With her new relationship she has a new status, which, as the opinion of the court suggests, could be the basis for acknowledging that, at least as to her, the sovereign's statutory waiver of immunity should hold and the sharp surgery of *Feres* be suspended.

FILED
Jul 7, 1987
Cathy A. Catterson, Clerk
U.S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOYCE ATKINSON,	)	No. 85-2200
	)	
Plaintiff-Appellant,	)	DC# C-84-0853-HMS
	)	
v.	)	
	)	ORDER
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellee.	)	

Before: NELSON, CANBY, and NOONAN, Circuit Judges

The order filed on March 27, 1987 is withdrawn.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOYCE ATKINSON,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 85-2200
ORDER

Filed March 27, 1987

Before: Dorothy W. Nelson, William C. Canby, Jr. and John T. Noonan, Jr., Circuit Judges.

COUNSEL

Allan S. Haley, Nevada City, California, for the plaintiff-appellant.

Mark J. Bennett, Assistant United States Attorney, Honolulu, Hawaii, for the defendant-appellee.

ORDER

Judges Nelson and Canby voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Noonan votes to grant the petition for rehearing and to reject the suggestion for rehearing en banc. The opinion filed November 14, 1986 is amended on pg. 9, lns. 2-4. suggested by Judge Canby, as follows:

> "Thus, in treating Atkinson for complications of her pregnancy, Atkinson's doctor was implementing

decisions of military judgment only in the remotest sense."

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U.S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOYCE ATKINSON,	)	No. 85-2200
	)	
Plaintiff-Appellant,	)	USDC# C-84-0853
	)	
v.	)	
	)	OPINION
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellee.	)	

Appeal From the United States District Court for the District of Hawaii
Hon. Harold M. Fong, District Judge, Presiding

Argued & Submitted: May 13, 1986 - San Francisco, California

Before: NELSON, CANBY and NOONAN, Circuit Judges.

Nelson, Circuit Judge:

Plaintiff-appellant Joyce Atkinson appeals from the district court's grant of summary judgment to the defendant-appellee United States. Atkinson argues that the

court erred in finding the United States immune from liability under the Federal Tort Claims Act for malpractice incident to pre-natal care she received from military personnel. We have jurisdiction under 28 U.S.C. §1291 (1982), and we reverse.

FACTUAL AND PROCEDURAL HISTORY

In March, 1982, Joyce Atkinson was serving as a Specialist (4th Class) with the United States Army in Hawaii. On March 26, during the second trimester of her pregnancy, she reported to Tripler Army Medical Center ("Tripler), complaining of blurred vision, hypertension and edema. The staff at Tripler did not treat her, and told her to go home. Three days later, Atkinson returned to Tripler, complaining of dizziness, nausea and hypertension. Again, the Tripler staff merely told her to go home. Two weeks later, Atkinson returned to Tripler complaining of severe

abdominal pain and hypertension. Finally, she was hospitalized for pre-eclampsia, a condition occurring in pregnancy which is life-threatening to both mother and fetus because of associated kidney failure, high blood pressure, stroke and premature birth. She claims that as a result of this negligent medical treatment, she delivered a stillborn child and suffered physical and emotional injuries of her own.

Atkinson filed a malpractice suit against the government under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2674 (1982), alleging that she "suffered great pain of body and mind and sustained serious and permanent bodily injuries as a result of the negligence of defendant's agents, employees and/or representatives in failing to properly diagnose her condition and hospitalize, treat, monitor and care for her." The United States filed a motion to

dismiss for failure to state a claim upon which relief may be granted, for judgment on the pleadings, and for summary judgment. The district court, finding that Atkinson was injured in the course of activity incident to service, held that the United States was immune from malpractice liability. Thus, the district judge granted the motion for summary judgment in a judgment filed April 23, 1985, from which Atkinson filed this timely appeal.[1]

STANDARD OF REVIEW

Determination of the district court's subject matter jurisdiction is a question of law reviewable de novo on appeal. Redding Ford v. California State Board of Equalization, 722 F.2d 496, 497 (9th Cir. 1983), cert.denied, 105 S. Ct. 84 (1984).

DISCUSSION

The FTCA, passed by Congress in 1946, represents the culmination of a long effort

to mitigate the unjust consequences of the common law sovereign immunity doctrine which protected the United States from tort liability. Feres v. United States, 340 U.S. 135, 139 (1950). Reacting against the notion that the sovereign could do no wrong, Congress provided in the FTCA that the United States is liable in tort "in the same manner and to the same extent as a private individual under like circumstances ...." 28 U.S.C. 2674 (1982). Congress did not exclude military personnel from FTCA coverage. The statute "provide[s] for District Court jurisdiction over any claim funded on negligence brought against the United States.... '[A]ny claim' [does not] mean[] 'any claim but that of servicemen.'" Brooks v. United States, 337 U.S. 49, 51 (1949) (emphasis in original).

Despite this "sweeping" legislatively-established waiver of immunity, United

States v. Yellow Cab Co., 340 U.S. 543, 547 (1951), in Feres v. United States, 340 U.S. 135, 146 (1950), the Supreme Court created a judicial exception to Congress's general rule of governmental liability. As originally formulated, this exception, informally known as the Feres doctrine, immunized the Government from liability under the FTCA "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146. The three concerns later identified as the foundation for this doctrine were: (1) the distinctively federal nature of the relationship between the Government and members of its armed forces; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure. See Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671-

72 (1977).

It now is clear, however, that the third concern of the three listed above is determinative:

> "[T]he protection of military discipline ... serves largely if not exclusively as the predicate for the Feres doctrine. Although the [Supreme] Court has woven a tangled web in its discussion of the 'distinctly federal' notion and of the alternative compensation system, it has not wavered on the importance of maintaining discipline within the armed forces. The Court has found it unseemly to have military personnel, injured incident to their service, asserting claims that question the propriety of decisions or conduct by fellow members of the military. Only this factor can truly explain the Feres doctrine and the crucial line it draws...."

Monaco v. United States, 661 F.2d 129, 132 (9th Cir. 1981) (quoting Hunt v. United States, 636 F.2d 580, 599 (D.C. Cir. 1980)), cert. denied, 456 U.S. 989 (1982). See also Johnson v. United States, 704 F.2d

1431, 1436 (9th Cir. 1983) (safeguarding military discipline is fundamental rationale for immunity). Indeed, in its latest word on the Feres doctrine, the Supreme Court confirmed that the overriding concerns of the doctrine are with the effect of a tort suit in the second-guessing of military decisions or in the impairment of military discipline. Shearer v. United States, 105 S. Ct. 3039, 3043 (1985). The Court specifically stated that the other factors enumerated in Feres no longer are controlling. Id. at 3043 n.4. Thus, the Feres doctrine bars suit only where a civilian court would be called upon to second-guess military decisions or where the plaintiff's admitted activities are of the sort that would directly implicate the need to safeguard military discipline. See Johnson, 704 F.2d at 1436.

In Shearer, the Supreme Court also

confirmed that courts should take a case-by-case, rather than per se, approach to claims of immunity. "The Feres doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in Feres and subsequent cases." 105 S. Ct. at 3043. Because Shearer makes clear that the paramount concern is with military decisions or discipline, in each case, we must determine the effect of a particular suit on military decisions or discipline. See Johnson, 704 F.2d at 1436 (in each case we must determine whether interests protected by Feres doctrine are implicated). "[W]here there is no relevant relationship between the service member's behavior and the military interests that might be jeopardized by civil suits, the Feres doctrine cannot bar recovery." Id. at 1440. See also Stanley v. United

States, 786 F.2d 1490, 1499 (11th Cir. 1986) (Shearer requires case-by-case analysis of whether barring claim serves purposes of Feres doctrine); Bozeman v. United States, 780 F.2d 198, 201 (2d Cir. 1985) (Shearer rejects bright-line tests and requires that each case be analyzed for applicability of Feres doctrine).

In light of the Supreme Court's unequivocal instruction to look at each case independently, we reject prior decisions to the extent they establish a per se rule prohibiting the medical malpractice claims of military personnel. In Henninger v. United States, 473 F.2d 814, 815 (9th Cir.), cert.denied, 414 U.S. 819 (1973), we held that Feres barred a military plaintiff's malpractice claim, which was based upon the negligent performance of an elective procedure, because it would be too difficult to

determine "the effect that a particular type of suit would have upon military discipline...." We reasoned that "[t]his is a classic situation where the drawing of a clear line is more important than being able to justify in every conceivable case, the exact point at which it is drawn." Id. at 816. Similarly, in Veillette v. United States, 615 F.2d 505, 507 (9th Cir. 1980), we refused to determine the effect of a particular malpractice suit on military discipline and morale, relying instead on the conclusory statement that 'allegations of medical malpractice ... have consistently been held to fall within the bounds of the [Feres] doctrine when the plaintiff was a serviceman on active duty at the time of the alleged malpractice." In light of Shearer's command to the contrary, the per se approach exhibited in Henninger and Veillette is improper. Thus,

we are not bound by those cases, or any others applying a per se rule, to hold that Feres bars Atkinson's suit for negligent care received incident to her pregnancy.

Given Shearer's command that in each case we determine the effect of a suit on military decisions or discipline, we cannot rely on any particular factor or factors as a "substitute for analysis" of whether the suit would threaten military discipline [sic].[2] See Troglia v. United States, 602 F.2d 1334, 1338 (9th Cir. 1979). Thus, that Atkinson would not have been entitled to care but for her military status is not sufficient to bar her suit. To hold otherwise "would overlook the foundation of Feres, that the Government's liability turns not on the reasons for the treatment from which the claim arises, but on the effect of a suit for damages on the military system." Bankston v. United

States, 480 F.2d 495, 497-98 (5th Cir. 1973). See also Parker v. United States, 611 F.2d 1007, 1011 (5th Cir. 1980) ("The test is not a purely causal one: one cannot merely state that but for the individual's military service, the injury would not occur."). Nor is it dispositive that the government's alleged negligence took place on-base; even where the negligence takes place on-base, we must "explore the nature of the 'function the soldier was performing at the time of the injury in order to ascertain the totality of the circumstances.'" Johnson, 704 F.2d at 1437 (quoting Parker, 611 F.2d at 1014). Similarly, that Atkinson was on active duty status when negligently treated is significant only if she was "engaging in an activity that [was] related in some relevant way to [her] military duties." Johnson, 704 F.2d at 1438. Thus, while

these factors may aid our inquiry, they are by no means dispositive. Id. at 1436 (cannot blindly apply rigid rules). Instead, we must ask whether "[t]he facts of this case, viewed in light of the Feres doctrine's underlying disciplinary rationale, lead us to conclude that the FTCA does permit [Atkinson's] cause of action." Id.

Making this inquiry, we find that the Feres doctrine does not bar Atkinson's claim. We first note that pregnant servicewomen did not serve on active duty in 1950 when Feres was decided. Thus, the Supreme Court, in barring the two malpractice claims involved in Feres, could not have had in mind the unique facts involved in Atkinson's claim. Confronting this novel situation, we fail to see how Atkinson's suit for negligent care administered in a non-field military

hospital incident to her pregnancy can possibly undermine "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel...." Chappell v. Wallace, 462 U.S. 296, 304 (1983). At the time Atkinson sought treatment, she was "not subject in any real way to the compulsion of military orders or performing any sort of military mission." Johnson, 704 F.2d at 1439. No command relationship exists between Atkinson and her attending physician. No military considerations govern the treatment in a non-field hospital of a woman who seeks to have a healthy baby. No military discipline applies to the care a conscientious physician will provide in this situation. Thus, in seeking treatment for complications of her pregnancy, Atkinson "was subject to military

discipline only in the very remotest sense." Id. at 1440. Cf. United States v. Lee, 400 F.2d 558, 564 (9th Cir. 1968) ("The necessity of maintaining discipline while a soldier is ... on an operating table is far less clear than the necessity for maintaining discipline among soldiers being transported for military service in military aircraft under control of military authorities."), cert.denied, 393 U.S. 1053 (1969).

Moreover, the circumstances of this case simply "do not involve the sort of close military judgment calls that the Feres doctrine was designed to insulate from judicial review." Johnson, 704 F.2d at 1440. We are not dealing with a case "where the government's negligence occurred because of a decision requiring military expertise or judgment." Id. Thus, a court hearing Atkinson's claim will not have to

inquire into "complex, subtle, and professional decisions as to composition, training, equipping and control of a military force." Gilligan v. Morgan, 413 U.S. 1, 10 (1973). The care provided a pregnant woman hardly can be considered to be distinctively military in character. In short, Atkinson's injuries have nothing to do with her army career "except in the sense that all human events depend upon what has already transpired." Brooks, 337 U.S. at 52. There is simply no connection between Atkinson's medical treatment and the decisional or disciplinary interest protected by the Feres doctrine.

Because Atkinson's claim is not the type that "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness," Shearer, 105 S. Ct. at 3044, we hold that

the district court had subject matter jurisdiction.

REVERSED

FOOTNOTES

1. The district judge's order was incorrect procedurally. When a court determines that the United States is immune from liability under the FTCA, the proper disposition is a dismissal for lack of subject matter jurisdiction, not a grant of summary judgment. Broudy v. United States, 661 F.2d 125, 128 n.5 (9th Cir. 1981). In light of our holding, however, this error is of no consequence. Since properly viewed, this case involves an appeal from an order dismissing the action for want of jurisdiction, we accept as true, for purposes of appeal, the factual allegations contained in Atkinson's complaint. Id. at 126 n.1.

2. We have noted previously the anomalous results obtained through reliance on these factors. See Troglia v. United States, 602 F.2d 1334, 1337-38 (9th Cir. 1979). For example, military personnel may sue in tort where military aircraft fall on their houses located off-base. Sapp v. United States, 153 F. Supp. 496 (W.D. La. 1957). Military personnel may not sue, however, where the aircraft fall on homes located on-base. Preferred Insurance Co. v. United States, 222 F.2d 942 (9th Cir.), cert.denied, 350 U.S. 857 (1955). See also Veillette v. United States, 615 F.2d 505,

507 (9th Cir. 1980) (that civilians, as well as military personnel, are admitted to military hospital draws attention to "the anomalies created by the court-made exception to the Tort Claims Act)."

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JOYCE ATKINSON,	)	CIVIL NO.
	)	84-0853
Plaintiff,	)	
	)	ORDER
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

This matter came before the Court on the motion of the defendant, the United

States, for summary judgment. Plaintiff, in her complaint, charges that while a member of the military, she was negligently treated at Tripler Army Medical Center. In Count I she makes a claim against the United States sounding in tort, and in Count II she makes a claim against the United States purportedly sounding in contract. The United States submitted an affidavit of Irene Matsumoto, which indicated that during the time defendant claimed she was negligently treated, (1) she was on active duty status with the United States Army, and (2) she received medical care at Tripler Army Medical Center incident to her service as an active duty member of the United States Army. Her army records indicated that at the time of the alleged negligent treatment, she had been in the military for approximately three years. She went to Tripler for treatment

regarding her pregnancy.

The United States has claimed that Feres v. United States, 340 U.S. 135 (1950), and its progeny clearly demonstrate that defendant's claim must be dismissed. Feres established the principle that the United States is not liable under the Federal Tort Claims Act "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" 340 U.S. at 146. One of the Feres cases involved medical malpractice, and the government has cited many cases holding that when an individual in the service receives treatment in a service hospital or facility, regardless of the reason for the treatment, he cannot recover under the Federal Tort Claims Act. Plaintiff has cited no cases to the contrary.

Plaintiff, however, claims that

Johnson v. United States, 704 F.2d 1431 (9th Cir. 1983), requires the Court to look at four factors in deciding whether the Federal Tort Claims Act applies to bar a particular suit. The Court first notes, however, that even Johnson appears to say that medical malpractice cases are in a different category, and that the four factors test does not necessarily apply. 704 F.2d at 1438-39. In any case, assuming the Johnson case applies, the four factors are as follows: 1) the place where the negligent act occurred; 2) the duty status of the plaintiff; 3) whether the benefits accrued to plaintiff because of his status as a service member; and 4) the nature of plaintiff's activities at the place the negligent act occurred. In this case, it is clear that the alleged negligent acts occurred at the Tripler Army Medical Center, an army hospital within the special

maritime and territorial jurisdiction of the United States. The plaintiff was, at the time, an active duty member of the military. In addition, the benefits accrued to the plaintiff because of her status as a member of the military. With regard to this point, plaintiff has argued that Tripler Army Medical Center might have treated her anyway, regardless of whether or not she was a member of the military. Plaintiff's counsel proffered these facts at the hearing on the government's motion. However, plaintiff submitted no affidavit. Rule 56(e) of the Federal Rules of Civil Procedure provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so

> respond, summary judgment, if appropriate, shall be entered against him.

Thus, the Court cannot take note of comments made by counsel at the hearing. In addition, defendant's argument has already been rejected by the Ninth Circuit. In Veillette v. United States, 615 F.2d 505, 507 (9th Cir. 1980), a plaintiff presented the exact argument this plaintiff presents here. The Court stated:

> Likewise we must reject appellants' argument that Airman Veillette's injuries were not incident to service because civilians as well as military personnel are sent to the Naval Hospital on Guam. Although the fact that civilians are admitted to the hospital indicates that Veillette was not treated there solely because of his status [citation omitted] it does not follow that Veilette's (sic) treatment there was not incident to his military service.

The fourth factor in the Johnson case concerns the nature of plaintiff's activities at the time the negligent act occurred. In this particular case, it is clear that plaintiff was at the military hospital, and treated at the military hospital, because of her status as a member of the United States Army. Thus, the Court finds that if the Johnson balancing test is applicable, all four factors militate in favor of granting summary judgment. Thus, as to Count I, the motion of the United States is granted.

Count II of the complaint purports to sound in contract. However, 28 U.S.C. §1491 and 28 U.S.C. 1346(a)(2) give the District Court jurisdiction to hearing contract claims against the United States only when the amount in controversy does not exceed $10,000.00. Thus, this Court is clearly without jurisdiction to hear

plaintiff's claim, assuming it does sound in contract. However, it is clear that the way plaintiff styles her complaint cannot control how it is viewed by this Court. It is also clear that she is alleging medical malpractice, and styling it in contract does not make it a contract claim. Woodbury v. United States, 313 F.2d 291, 296 (9th Cir. 1963). In deciding whether a claim is one of contract or tort, a court looks at the nature of the injury or loss suffered and the type of damages requested. Martin v. United States, 649 F.2d 701 (9th Cir. 1981). In examining plaintiff's claim in this light, it is clear that hers is a tort claim. Thus, the Federal Tort Claims Act bars her claim as to Count II of the complaint as well as Count I.

Wherefore, as there is no genuine issue of fact, and summary judgment appears to the Court appropriate, it is hereby

ordered that summary judgment in favor of the United States, and against the plaintiff Joyce Atkinson is hereby granted as to both Counts I and II of the complaint, and the complaint, and the action, are both dismissed with prejudice.

DATED: April 23, 1985, at Honolulu, Hawaii.

HAROLD M. FONG
United States District Judge

APPROVED AS TO FORM:

L. RICHARD FRIED, JR.
Attorney for Plaintiff

JOYCE ATKINSON v. UNITED STATES OF AMERICA
ORDER
Civil No. 84-0853